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No. 04-1264

Supreme Court, U.S.
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In The

Supreme Court of the United States

BUCKEYE CHECK CASHING, INC.,

Petitioner,

v.

JOHN A. CARDEGNA and DONNA REUTER,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Florida

BRIEF OF UNIVERSITY OF WISCONSIN LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. FAA PREEMPTION IS UNCONSTITUTIONAL	3
A. Despite *Southland*'s Assertion to the Contrary, the FAA is Procedural Regulation that Cannot Constitutionally Control State Courts	3
1. The Enforcement of Arbitration Agreements is Fundamentally Procedural	4
2. This Court Has Held Arbitration to be Procedural in the Context of Pre-Dispute Waivers	5
3. This Court Has Held Arbitration to be Procedural in the Conflict of Laws Context	7
4. *Southland*'s Statement that the FAA is Substantive Law for Preemption Purposes is Erroneous	8
B. Congress Lacks the Power to Regulate State Court Procedures	12
1. Constitutional Structure and Centuries of Precedent Dispel the Idea of a General Congressional Power to Regulate State Court Procedures	12
2. The Supremacy Clause Imposes Only Federal Substantive Law, and Not Procedural Law, on the State Courts	14

TABLE OF CONTENTS – Continued

Page

3. The Commerce Power Does Not Authorize Procedural Regulation of State Courts 17

II. THIS CASE PRESENTS THE PROPER OCCASION TO OVERRULE *SOUTHLAND* ... 19

A. *Southland* Suffers from Constitutional Infirmities Comparable to *Swift v. Tyson* 19

B. *Southland*'s Authority Has Been Eroded by Subsequent Decisions of this Court..... 21

C. *Southland*'s Unworkable Test for Preemption Has an Unsettling Effect on the Law That Outweighs Any Legitimate Reliance Interests by Private Contracting Parties... 22

D. *Southland*'s Imposition of a "National Policy Favoring Arbitration" on the States Intrudes on the State-Federal Balance by Preempting Broad Swaths of State Contract Law 24

E. This Court's "Clear Statement" Rule and the Doctrine of Constitutional Avoidance Undermine Any Contention that *Southland* Properly Construes the FAA 26

CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES

Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995) 5, 19, 22, 27, 28

Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956) 7

Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807) 13

Bradley v. Harris Research, 275 F.3d 884 (9th Cir. 2001) 23

Bronson v. Kinzie, 42 U.S. (1 How.) 311 (1842) 12

Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945) 5

Circuit City Stores v. Adams, 532 U.S. 105 (2001) ... 6, 20, 21

Cohens v. Virginia, 19 U.S. (6 Wheat) 264 (1821) 15

Dice v. Akron, Canton & Youngstown R. Co., 342 U.S. 359 (1952) 17

Doctors Associates v. Casarotto, 517 U.S. 681 (1996) 22

Doctors Associates v. Hamilton, 150 F.3d 157 (2d Cir. 1998) 23

EEOC v. Waffle House, 534 U.S. 279 (2002) 6, 21

Egelhoff v. Egelhoff, 532 S. Ct. 141 (2001) 26

English v. General Electric Co., 496 U.S. 72 (1990) 27

Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) 7, 20, 21

Felder v. Casey, 487 U.S. 131 (1988) 17

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 7, 21

TABLE OF AUTHORITIES – Continued

Page

Green Tree Fin. Serv. v. Bazzle, 539 U.S. 444 (2003) 22

Gregory v. Ashcroft, 501 U.S. 452 (1991) 12, 24, 25, 26

Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co., 284 U.S. 151 (1931) 13

Howlett v. Rose, 496 U.S. 456 (1990) 2, 12, 15, 16

Jinks v. Richland County, 538 U.S. 456 (2003) 3, 9

Johnson v. Fankell, 520 U.S. 911 (1997) 2, 12, 15, 16, 17

KKW Enterprises v. Gloria Jean's Gourmet Coffees Franchising Corp., 184 F.3d 42 (1999) 23

Landgraf v. USI Film Prods., 511 U.S. 244 (1994) 4, 5

Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995) 4, 8

Mesa v. California, 489 U.S. 121 (1989) 19

Minneapolis & St. L. R. Co. v. Bombolis, 241 U.S. 211 (1916) 14

Mitchell v. Forsyth, 472 U.S. 511 (1985) 16

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 5, 7, 21

Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1 (1983) 9

New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) 25

New York v. United States, 505 U.S. 144 (1992) 18, 25

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 24

Perry v. Thomas, 482 U.S. 483 (1987) 22

TABLE OF AUTHORITIES – Continued

Page

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) 1, 3, 19

Printz v. United States, 521 U.S. 897 (1997) 2, 14, 18

Reno v. Condon, 528 U.S. 141 (2000) 18

Rodriguez de Quijas v. Shearson American Express, 490 U.S. 477 (1989) 6, 7, 21

San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) 10

Santa Fe Industries v. Green, 430 U.S. 462 (1977) 24

Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) 6

Solid Waste Agency of Northern Cook County v. Army Corps of Engineers, 531 U.S. 159 (2001) 26

Southland Corp. v. Keating, 465 U.S. 1 (1984) .....*passim*

Stirlen v. Supercuts, 51 Cal. App. 4th 1519, 60 Cal. Rptr. 2d 138 (1997) 24

Sun Oil Co. v. Wortman, 486 U.S. 717 (1988) 3, 7, 14

Swift v. Tyson, 42 U.S. (16 Pet.) 1 (1842) 20, 21

Tarble's Case, 80 U.S. (13 Wall.) 397 (1871) 13

Testa v. Katt, 330 U.S. 386 (1947) 14, 18

Ting v. AT&T, 182 F. Supp. 2d 902 (N.D. Cal. 2002), *aff'd in part, rev'd in part* 319 F.3d 1126 (9th Cir. 2003) 23

United States v. Lopez, 514 U.S. 549 (1995) 1, 17, 25

United States v. Morrison, 529 U.S. 598 (2000) ... 2, 17, 20, 25

Washington v. W.C. Dawson & Co., 264 U.S. 219 (1924) 20

TABLE OF AUTHORITIES – Continued

Page

Wilko v. Swan, 346 U.S. 427 (1953) 5, 6

Wolfe v. North Carolina, 364 U.S. 177 (1960) 13

CONSTITUTIONS, STATUTES AND LEGISLATIVE MATERIALS

United States Constitution

Art. I, § 8, cl. 9 13

Art. III, § 1 13

Art. IV, § 1 14

Tenth Amendment 18

Employee Retirement Income Security Act, 29 U.S.C. § 1144(a) 19

Federal Arbitration Act, 9 U.S.C. § 1, et seq. ..... *passim*

Judiciary Act of 1789, § 34 20

National Labor Relations Act, § 10, 29 U.S.C. § 160 10

Securities Act of 1933, §14, 15 U.S.C. § 77n 6

OTHER AUTHORITIES

6A *Corbin on Contracts* § 1515 (1962) 5

William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 Geo. L. Rev. 1361 (1988) 20

The Federalist No. 82 (Hamilton) (Rossiter ed. 1961) 13, 15

Stephen A. Gardbaum, *The Nature of Preemption*, 79 Corn. L. Rev. 767 (1994) 25

Henry Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489 (1954) 15

TABLE OF AUTHORITIES – Continued

Page

2 J. Kent, *Commentaries on American Law* (2d ed. 1832) 12

Restatement (Second) of Conflict of Laws § 122 7

Restatement (Second) of Contracts § 195 5

David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: the Supreme Court and the Federal Arbitration Act*, 67 Law & Contemp. Prob. 5 (2004) 28

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David S. Schwartz, *State Judges as Guardians of Federalism: Resisting the Federal Arbitration Act's Encroachment on State Law*, 16 Wash. U. J. L. & Pol. 129 (2004) 24

INTEREST OF AMICI CURIAE

Amici curiae are law professors whose teaching and scholarship focus on federalism, and in particular, the preservation of the states' role as "laboratories of experimentation in social policy." *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).[1] Amici have studied the doctrine of Federal Arbitration Act preemption and note with great concern that it is one of the most sweeping doctrines of federal preemption in current American law, one that has made great inroads into state autonomy and policy experimentation in areas traditionally left to state law. Moreover, amici are concerned that *Southland Corp. v. Keating*, 465 U.S. 1 (1984), which establishes FAA preemption, was wrongly decided as a matter of statutory interpretation and in fact applies the FAA unconstitutionally as a Congressional assertion of control over state court structure, procedure and jurisdiction.

SUMMARY OF ARGUMENT

The question before the Court, whether the rule of *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), must be applied by a state court, presents at bottom a question of Federal Arbitration Act preemption

[1] Letters of consent to the filing of amicus briefs, including this one, have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for amici state that no counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel have made a monetary contribution to the preparation or submission of this brief.

that depends on the validity of *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

Although the Justices of this Court have divided closely on certain issues relating to federalism and Congressional power to control state policymaking, *see, e.g., United States v. Morrison*, 529 U.S. 598 (2000), *Printz v. United States*, 521 U.S. 897 (1997), this Court has been unanimous in reaffirming the centuries-old principle that states retain sovereignty over the structure, procedure and jurisdiction of their courts. *See Johnson v. Fankell*, 520 U.S. 911 (1997); *Howlett v. Rose*, 496 U.S. 356, 372 (1990).

FAA preemption flies in the face of this principle of respect for state court procedural autonomy. Notwithstanding *Southland*'s conclusory assertion that the FAA is substantive, the FAA and its rule of enforcement of arbitration agreements is fundamentally procedural: it imposes a choice of the forum that will hear the case and an accompanying procedural regime. Thus, as applied to cases such as this one – a state law matter heard in state court – the FAA heedlessly restructures state court procedures and runs roughshod over the state's choices on the allocation of authority to various tribunals within its own dispute resolution system.

Although this Court has never had occasion to address the question head on, the structure of the Constitution and this Court's longstanding precedents weigh heavily against the idea that Congress has the authority to impose procedural rules on state courts. *See* David S. Schwartz, *The Federal Arbitration Act and the Power of Congress Over State Courts*, 83 Oregon L. Rev. 541 (2004). But even if this Court chooses not to reach that question in this case, it is still clear that *Southland* erred. Given the FAA's

fundamentally procedural character, *Southland* violated well-established doctrines of statutory interpretation – the doctrine of constitutional avoidance and the presumption against preemption – in holding that the FAA binds state courts. Because the argument of Petitioner Buckeye Check Cashing depends on an application of *Southland* to apply the *Prima Paint* rule to state courts, the court below can be reversed only if *Southland* is reaffirmed. Amici urge this Court to take this opportunity to overrule *Southland*.

ARGUMENT

I. FAA PREEMPTION IS UNCONSTITUTIONAL

A. Despite *Southland*'s Assertion to the Contrary, the FAA is Procedural Regulation that Cannot Constitutionally Control State Courts

While the Supremacy Clause obligates state courts to apply federal *substantive* law applicable in cases before them, it is well established that state courts at all times retain control over their own procedures. (*See infra* section B.) This Court has recently observed that "the meaning of 'substance' and 'procedure' in a particular context is 'largely determined by the purposes for which the dichotomy is drawn.'" *Jinks v. Richland County*, 538 U.S. 456, 465 (2003) (quoting *Sun Oil Co. v. Wortman*, 486 U.S. 717, 726 (1988)). *Southland* decided this question without reference to such purposes, and its conclusion that the FAA is substantive law does not withstand scrutiny. From any angle, the FAA is fundamentally procedural.

1. The Enforcement of Arbitration Agreements is Fundamentally Procedural

Substantive law controls "the primary activity of citizens." *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (Harlan, J., concurring), and is equated with "rights of recovery." *Felder v. Casey*, 487 U.S. 131, 141, 150 (1988). Procedural rules, in contrast, do not affect primary activity, but simply define how and by whom a dispute will be heard. Thus, this Court has held that changes in procedural rules "instituted after the conduct giving rise to the suit" will be applied without concerns regarding retroactivity "[b]ecause rules of procedure regulate secondary rather than primary conduct[.]" *Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 (1994). Likewise, new jurisdictional rules will normally be applied to pending cases because they "speak to the power of the court rather than to the rights or obligations of the parties" and "take away no substantive right but simply change[] the tribunal that is to hear the case." *Id.* at 274 (internal citations and quotations omitted).

Although the FAA provides for an apparent "right of action" to enforce a contract, an arbitration agreement is simply a contract about procedure. It does not establish any primary rights or duties, or create a right of recovery, but rather establishes the rules to be followed in the event of a dispute. An arbitration agreement affects only "the allocation of power between alternative tribunals." *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 60 (1995). Once the court enforces the arbitration agreement, the consequences are entirely procedural. Enforcement of an arbitration agreement is the imposition of "alternative dispute resolution," which simply "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of

arbitration." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 630 (1985). An arbitration agreement is no more "substantive" than a pre-dispute contract agreeing on the number of depositions to be taken in a future lawsuit. In retroactivity terms, whether or not an arbitration agreement is enforced is not substantive because it "simply changes the tribunal that is to hear the case." *Landgraf*, 511 U.S. at 274; *see Mastrobuono*, 514 U.S. at 60. Overruling *Southland* and dispensing with FAA preemption would not disturb the kind of reliance interests considered in retroactivity cases: "Primary behavior is not affected: No rule of conduct is retroactively changed, but only (perhaps) the forum in which violation is to be determined and remedied." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 285 (1995) (Scalia, J., dissenting).

2. This Court Has Held Arbitration to be Procedural in the Context of Pre-Dispute Waivers

It is well established that substantive rights and remedies are not waivable in pre-dispute adhesion contracts. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985) ("[i]n the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy"); *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 727 (1945) (advance waiver of remedies for wage and hour violations void because it would "nullify the purposes of the statute); *see generally Restatement (Second) of Contracts* § 195(1) (1981); 6A *Corbin on Contracts* § 1515 (1962).

At one time this Court applied the same principle to arbitration agreements, on the theory that compelling arbitration as a substitute for judicial enforcement adversely affected substantive rights. In *Wilko v. Swan*, 346 U.S. 427 (1953), the Court rejected a claim by a defendant brokerage firm to enforce a predispute arbitration agreement against a customer asserting a claim under the Securities Act of 1933. The Court held that the right to enforce the Securities Act provisions in court was a nonwaivable "substantial" right pursuant to § 14 of the Act, which prohibited any contract term "purporting to . . . waive compliance with any provision of this law," 15 U.S.C. § 77n.

But in *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477 (1989), this Court overruled *Wilko*, holding that the right to a judicial forum for Securities Act claims, as against a predispute arbitration agreement, is not substantive. The antiwaiver language in the Securities Act should have been "read to relate to *substantive* provisions of the Act" *rather than* arbitration. 490 U.S. at 480 (internal quotations omitted) (emphasis added). This Court specifically rejected *Wilko*'s determination that arbitration affected substantive rights, calling the selection of an arbitral versus a judicial forum merely "procedural." *Id.* at 482. The Court's recent FAA cases repeatedly affirm that arbitration agreements are "in effect, a specialized kind of forum selection clause," *id.* at 482-83 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974); *accord EEOC v. Waffle House*, 534 U.S. 279, 295 (2002), and that a party compelled to arbitrate "does not forgo . . . substantive rights," but "only submits to their resolution in an arbitral, rather than a judicial, forum." *E.g.*, *Circuit City Stores v. Adams*, 532 U.S. 105, 123 (2001) ("by agreeing to

arbitrate ... a party does not forego ... substantive rights"); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (same); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 630 (1985) (same).[2]

3. This Court Has Held Arbitration to be Procedural in the Conflict of Laws Context

Conflict of laws principles may sometimes require a state court to apply the substantive law of another state, but a state court may always apply its own procedural law. *Restatement (Second) of Conflict of Laws* § 122. Thus, in *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1987), this Court held that a state could apply its own statute of limitations to a cause of action governed by the substantive law of a sister state; the statute of limitations was procedural for

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[2] These holdings vitiate one of *Southland*'s primary rationales for imposing FAA § 2 on the states: the purported need to impose a uniform federal rule to prevent forum shopping. *Southland*, 465 U.S. at 15. Forum shopping is a concern only where the parties are able to shop for favorable *substantive* rules that are likely to affect the outcome. But because the enforcement *vel non* of the arbitration agreement should *not* affect the outcome of a case, there is no forum shopping problem – any more than with any forum selection clause, where the same substantive law would be applied by the alternate fora.

On similar grounds, it is also clear that arbitration would be deemed procedural for *Erie* purposes. Although this Court has had no occasion to revisit its determination in *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 203 (1956), that arbitration is "outcome determinative," the holding and rationale of *Rodriguez* effectively overrule *Bernhardt* on this point. *Erie* analysis is supposed to be guided by the "twin aims" of discouraging forum shopping and avoiding unfairness in the administration of justice, neither of which are an issue if arbitration provides a fair forum that creates no predictable advantage to one side. *See* Schwartz, *Power of Congress*, *supra*, 83 Ore. L. Rev. at 607-09.

choice-of-law purposes, and therefore a matter of state sovereignty. *Id.* at 726, 727.

In *Mastrobuono v. Sheason Lehman Hutton*, 514 U.S. 52 (1995), this Court was asked to determine whether a choice-of-law clause adopting "the laws of the state of New York" was intended to incorporate a state law rule barring arbitrators from awarding punitive damages. The Court held the agreement to be ambiguous on this point, in large part because choice of law provisions are naturally read to include only substantive law: "In other words, the provision might include only New York's substantive rights and obligations, and not the State's allocation of power between alternative tribunals." *Id.* at 60. By placing the question of the state's "allocation of power between" courts and arbitrators on the other side of the line from "substantive rights and obligations," *Mastrobuono* plainly holds that arbitration is not substantive law for conflict-of-laws purposes.

4. *Southland*'s Statement that the FAA is Substantive Law for Preemption Purposes is Erroneous

Southland's assertion that the FAA is substantive law is contradicted by the basic understanding of the distinction between substantive and procedural law, as well as by this Court's more recent decisions holding arbitration to be procedural for pre-dispute waiver and conflict-of-laws purposes. Can it be said that preemption and the Supremacy Clause are a different "context" for purposes of a substance/procedure line? Even if the answer to that question is "yes," *Southland* errs by holding arbitration and the FAA to be substantive for preemption purposes.

In the Supremacy context, "the purposes for which the [substance-procedure] dichotomy is drawn," *Jinks*, 538 U.S. at 465, must be to balance the federalism interest between Congress's power to govern the people of the several states under its enumerated powers and the states' interest in maintaining sovereignty over their courts. Analysis of the substance-procedure distinction for Supremacy purposes should consider whether the federal statute restructures or modifies neutral rules of state judicial administration without the presence of a substantive impact on primary rights. Looking at the state sovereignty stakes, the effect of the FAA as a procedural restructuring of state courts is readily apparent. With FAA preemption, state law cases between non-diverse parties – cases that would be decided entirely within the state court system, such as the instant case – must be reallocated to the alternative dispute resolution forum, notwithstanding any contrary state policy. One set of procedures – arbitration procedures – is thereby substituted for state-mandated procedures. Although most states have arbitration enforcement statutes, many of these create exceptions allowing certain categories of cases to remain in court. Thus, the FAA should be viewed as procedural for Supremacy Clause purposes because its primary effect, applied to the states, is to restructure state judicial systems by overriding state decisions about how to allocate disputes among alternative fora within the state dispute resolution system.

Two objections could be raised to the argument that arbitration of a would-be state court case is part of the state's dispute resolution system. First, it can be argued that the FAA federalizes all arbitration law. *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983) (dicta). Where the FAA applies, this argument

suggests, arbitration is an adjunct federal forum with exclusive jurisdiction, rather than an alternative state forum. In this light, the FAA's intrusion on state sovereignty is essentially the same as that of the National Labor Relations Board, a non-judicial federal instrumentality which has exclusive original jurisdiction over certain labor law matters, displacing state courts. *See San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 241-42 (1959) (holding that National Labor Relations Board has preemptive primary jurisdiction over federal labor matters); National Labor Relations Act § 10, 29 U.S.C. § 160 (2000) (same).

But this argument fails. While arbitration may be a federal adjunct in those cases where arbitration is compelled by a federal court, FAA preemption means that state courts must compel arbitration, even where no federal jurisdiction is present. Moreover, exclusive federal jurisdiction results from an assertion of federal subject matter jurisdiction, which the FAA does not create. *See Southland*, 465 U.S. at 15 n.9. A law cannot deprive state courts of jurisdiction while at the same time expecting state courts to apply it.[3]

The second objection is that arbitration is "private": the FAA does not restructure state courts, it could be argued, but rather bars a class of cases from state court and sends them into a third world of adjudication, one that

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[3] Where federal courts have exclusive jurisdiction, a state court must simply dismiss the case – the state court's involvement ends. With arbitration, under the FAA and state analogues, a court normally stays the litigation but retains jurisdiction as the parties arbitrate. Often the winner in arbitration will return to court to ask for the award to be confirmed as a judgment; sometimes the loser will seek to have the award set aside on one of the limited grounds for judicial review.

is independent of both the state and federal systems. But this objection likewise fails. To begin with, the creation of a right of action – whether enforced in arbitration or court – means opening the door of the state's dispute resolution system. Moreover, most of the "law" of arbitration – and certainly the doctrine of FAA preemption – arises only in the context of disputed arbitration agreements. Where parties engage in truly private ordering to resolve their disputes, they can reach a private agreement to arbitrate (pre-dispute or not), adhere to that agreement without contesting it in court, and submit voluntarily to the arbitrator's decision. But the FAA and state arbitration statutes make that process part of the public dispute resolution system for any dispute where one of the parties deviates from that purely private model – typically, by resisting arbitration or asking a court to compel it; by seeking judicial review of a disputed procedural matter or of the arbitrator's award; or by seeking to confirm the arbitration award as a judgment of the court. Invoking any aspect of an arbitration statute crosses a significant line from pure private ordering into a zone of public dispute resolution. Even where the parties submit to a pre-dispute arbitration agreement without litigating any enforcement issues, the background law of enforcement – and the prospect of state coercion or enforcement – make that agreement part of the state system. Only if an arbitration were purely voluntary at every stage – regardless of background state arbitration law – could it be seriously contended that arbitration was not part of the state dispute resolution system.

B. Congress Lacks the Power to Regulate State Court Procedures

1. Constitutional Structure and Centuries of Precedent Dispel the Idea of a General Congressional Power to Regulate State Court Procedures

Questions of procedure "belong[] to the discretion of every government, consulting its own interest and convenience." 2 J. Kent, *Commentaries on American Law* 462-63 (2d ed. 1832). A state's authority over the structure and procedure of its own court system is a fundamental attribute of state sovereignty. "Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1990). Procedural questions fundamentally concern the allocation of the state's decisionmaking power to courts. This allocation question – "deciding who decides" – is the most basic question of Constitution-making, and therefore goes to the very heart of government sovereignty. How procedural systems are structured also determines the nature of justice that is delivered. For these reasons, this Court has repeatedly treated as axiomatic the notion that states are sovereign over the structure, jurisdiction and procedure of their court systems. As this Court unanimously declared in *Johnson v. Fankell*, 520 U.S. 911 (1997), "We have made it quite clear that it is a matter for each state to decide how to structure its judicial system." *Id.* at 923 n.13. Over a century earlier, the Court likewise stated, "Undoubtedly, a state may regulate at pleasure the modes of proceeding in its courts." *Bronson v. Kinzie*, 42 U.S. (1 How.) 311, 315 (1842); *accord Howlett v. Rose*, 496 U.S. 356, 372 (1990) ("the states have great latitude to establish the structure

and jurisdiction of their own courts"); *Wolfe v. North Carolina*, 364 U.S. 177, 195 (1960) ("Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise"); *Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151 (1931) ("the procedure by which rights may be enforced and wrongs remedied is particularly a subject of state regulation and control"); *Tarble's Case*, 80 U.S. (13 Wall.) 397, 407 (1871) ("How [state and federal governments'] respective laws shall be enacted; how they shall be carried into execution; *and in what tribunals*, or by what officers ... are matters subject to their own control, and in the regulation of which neither can interfere with the other") (emphasis added).

The Constitution nowhere grants Congress any general power to regulate the judiciaries of the several states. This absence is striking, in light of the framers' twin assumptions that state courts would play a central role in handling not only interstate judicial business arising under state law, but also (pending creation of lower federal courts) a significant quantity of federal judicial business. *See* The Federalist No. 82, at 492-95 (Hamilton) (Rossiter ed. 1961). Where the Constitution grants Congress general authority to regulate a court system, the Constitution speaks of a power to "constitute" or "ordain and establish" "Tribunals" or "Courts" that are "inferior" to the Supreme Court. U.S. Const. Art. I, § 8, cl. 9; U.S. Const. Art. III, § 1. These are plainly federal courts. According to Chief Justice Marshall, "state courts are not, in any sense of the word, inferior courts ... because they emanate from a different authority, and are the creatures of a distinct government." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 97 (1807); *see,*

e.g., *Minneapolis & St. L. R. Co. v. Bombolis*, 241 U.S. 211, 222 (1916) (Supremacy Clause requirement that state courts hear federal cases "in no sense implied . . . that for the purpose of enforcing the right the state court was to be treated as a Federal Court deriving its authority not from the State creating it, but from the United States").[4]

2. The Supremacy Clause Imposes Only Federal Substantive Law, and Not Procedural Law, on the State Courts

The Supremacy Clause[5] obligates state judges to apply federal substantive law applicable to disputes in state court, *see Testa v. Katt*, 330 U.S. 386 (1947), but nothing in

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[4] The Full Faith and Credit Clause, U.S. Const. Art. IV, § 1, allows Congress limited authority to regulate procedural questions respecting the effect of the judgments of one state's court in another, as well as rules governing the choice of law in state courts. *See, e.g., Sun Oil Co. v. Wortman*, 486 U.S. 717, 729 (1987). However, this specific constitutional mandate involves coordination of states' authority vis à vis each other, rather than between the federal and state sovereignties, and is a far cry from a general power over state court procedures.

[5] The Supremacy Clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; *and the judges in every state shall be bound thereby*, any Thing in the constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Art. VI, cl. 2 (emphasis added). It has never seriously been argued that the Supremacy Clause is itself an affirmative grant of legislative authority to Congress to control state courts; rather, any federal statute binding on state courts must be duly enacted according to one of Congress's enumerated powers. *See, e.g., Printz v. United States*, 521 U.S. 897, 925 (1997).

this obligation implies any diminution of state sovereignty over how those courts are constituted or what procedures they will follow. On the contrary, the framers recognized that the power of state courts to apply federal law follows from their pre-existing jurisdiction. Thus, Hamilton argued that state courts will necessarily have "a concurrent jurisdiction in all cases arising under the laws of the Union where it is not expressly prohibited," precisely because "[t]he judiciary power of every government" includes the power to apply the substantive law of any sovereign that may be applicable to a dispute before it. The Federalist No. 82, at 492 (Hamilton); *see Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 415 (1821) (per Marshall, C.J.) (Supreme Court review of federal law decisions in state court was needed precisely because federal questions were otherwise "confided . . . to the state courts, *however they may be constituted*") (emphasis added).

The modern Supreme Court has repeatedly reaffirmed "the general rule, 'bottomed deeply in belief in the importance of state control of state judicial procedure, . . . that federal law takes the state courts as it finds them.'" *Howlett v. Rose*, 496 U.S. 356, 372 (1990) (quoting Henry Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 508 (1954)); *accord Johnson v. Fankell*, 520 U.S. 911, 919 (1997). This Court has recognized that *Testa*'s "requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented." *Howlett*, 496 U.S. at 372. Indeed, *Testa* is a continuation of a long-standing line of cases which take pains to point out that in imposing federal *substantive* law on state courts via the Supremacy

Clause, Congress "had not attempted 'to enlarge or regulate the jurisdiction of state courts or to control or affect their modes of procedure[.]" *Howlett*, 496 U.S. at 373 (quoting *Mondou v. New York, N.H. & Hart. R. Co.*, 223 U.S. 1, 56 (1912)).

Even where a significant federal right may be lost due to neutral state procedural rules, this Court has reaffirmed the procedural autonomy of state courts. In *Johnson v. Fankell*, the Idaho courts had applied state appellate procedure to deny the defendant state officials an interlocutory appeal from the trial court's denial of summary judgment on their qualified immunity defense. Under federal law, in contrast, a district court order denying a qualified immunity defense prior to final judgment – whether on a 12(b)(6) motion to dismiss or motion for summary judgment – is immediately appealable on an interlocutory basis. *Mitchell v. Forsyth*, 472 U.S. 511 (1985). Thus, under *Mitchell*, a valid qualified immunity defense carries in tow the important procedural right not to have to submit to the burden of pretrial litigation, particularly discovery processes. The *Johnson* defendants argued that the right to interlocutory appeal was bound up with their substantive federal defense of qualified immunity, and that the Idaho rule barring interlocutory appeal was therefore preempted because it interfered with their federal right to be free from burdensome pretrial litigation – an interest very similar to that asserted by a party seeking to compel arbitration.

This Court unanimously rejected that argument. The Court reasoned that the "normal presumption against preemption" was "buttressed" by the compelling federalism interest in allowing states to control their own judicial procedures; the Idaho courts' dismissal of the interlocutory

appeal "rested squarely on a neutral state Rule regarding the administration of the state courts." 520 U.S. at 918. "Principles [that] are fundamental to a system of federalism" outweighed the defendant's argument that their federal rights would justify "requir[ing] a State to undertake something as fundamental as restructuring the operation of its courts." *Id.* at 922. Thus, as *Johnson v. Fankell* makes clear, federal supremacy of substantive law stops short of permitting Congress to override neutral rules of state procedure or judicial administration.[6]

3. The Commerce Power Does Not Authorize Procedural Regulation of State Courts

Assuming arguendo that state court litigation comes within one of the definitions of "interstate commerce" – which is open to debate, *see United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995) – that does nothing to undermine this Court's longstanding recognition of the states' sovereignty over their own court procedures. In *Johnson v. Fankell*, there was no question that section 1983 claims were within Congress's enumerated powers; nevertheless, the Court held that Congress's power over substance did not extend to a power over state court procedure.

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[6] In a handful of cases, this Court has recognized a limited exception – the so-called "reverse-*Erie*" doctrine – in which Congress may influence some procedural incidents of federal rights heard in state courts by preempting non-neutral state procedures that unduly discriminate against substantive federal rights. *See Felder v. Casey*, 487 U.S. 131, 138 (1988) (striking down Wisconsin statute imposing special notice requirement on federal civil rights plaintiffs); *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359 (1952); *see* Schwartz, *Power of Congress*, *supra*, 83 Ore. L. Rev. at 581-88.

Moreover, this Court's holdings in *New York v. United States*, 505 U.S. 144 (1992) and *Printz v. United States*, 521 U.S. 897 (1997), should foreclose the notion that Congress can directly regulate state court structure, procedure and jurisdiction. The *Testa* line of cases is quite consistent with the principle underlying *Printz* and *New York*, that federal supremacy means the power of Congress to regulate the people directly, but not the power to regulate the people indirectly by regulating state governments. *See New York*, 505 U.S. at 164-65; *Printz*, 521 U.S. at 920. A Congressional directive to change a state court procedure is not simply a command to apply existing state judicial resources to enforce a federal right, but a directive to state courts to regulate litigants in a particular way. Codes of procedure either come directly from state legislatures, or else from courts in a quasi-legislative, rulemaking capacity, or from state constitutions. Likewise, the creation of a court and the definition of its jurisdiction are in the first instance legislative or constitutional acts, rather judicial acts. To assert control over procedure or jurisdiction, Congress would have to "commandeer" the state legislature or its constitutional process. Congressional control over state procedure thus seems to be the very sort of commandeering condemned in *Printz* and *New York*. Federalism principles, whether located in the Tenth Amendment or elsewhere, *see New York*, 505 U.S. at 156, 160; *Printz*, 521 U.S. at 518; *Reno v. Condon*, 528 U.S. 141, 147 (2000), protect the states' sovereignty over their governmental processes from such commandeering.[7]

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[7] Congress *does* have the power to displace state court jurisdiction entirely: by creating substantive federal rights, preempting state law and giving federal courts exclusive jurisdiction, as it has done under

(Continued on following page)

II. THIS CASE PRESENTS THE PROPER OCCASION TO OVERRULE *SOUTHLAND*

Although, strangely, Petitioner's brief cites *Southland* only once and never even mentions preemption, Petitioner's argument squarely depends on *Southland* and the doctrine of FAA preemption. Without *Southland*, there could be no conceivable basis for arguing that the *Prima Paint* rule – a federal rule allocating decisionmaking authority between federal courts and arbitrators when fraud is asserted as a defense to an arbitration agreement – applies in state court. Therefore, *Southland*'s constitutionally doubtful interpretation of the FAA is directly implicated in this case.

A. *Southland* Suffers from Constitutional Infirmities Comparable to *Swift v. Tyson*

Special circumstances warrant overruling *Southland*. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 284 (1995) (Scalia, J., dissenting) ("proper application of

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ERISA, 29 U.S.C. § 1144(a). But any suggestion that Congress's power to enact a completely preemptive regulatory scheme carries the "lesser included" power of dictating state court procedures suffers from a fundamental flaw. While the purported power to regulate state procedures may represent a lesser *intrusion* on state autonomy than complete preemption of a field, it is not a "lesser included" power, *because it is not "included."* The fact that Congress possesses the nuclear bomb of preemption-plus-exclusive-jurisdiction does not imply that it also possesses a small commando team with "surgical strike" capability. This "lesser included" argument is also a close cousin to the constitutionally dubious theory of "protective jurisdiction," which holds that Congress can give jurisdiction to federal courts over state law claims where Congress could, but has not, preempted state law with substantive federal regulation. This Court has declined to embrace that theory. *See Mesa v. California*, 489 U.S. 121, 137 (1989).

stare decisis does not prevent correction of the mistake" of *Southland*). Justice Brandeis wrote that stare decisis "is not an inexorable command. The instances in which the court has disregarded its admonition are many." *Washington v. W.C. Dawson & Co.*, 264 U.S. 219, 238 (1924) (Brandeis, J., dissenting).[8] Fourteen years later, a majority of the Court joined Justice Brandeis, in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), to overrule a 96-year-old statutory interpretation precedent, *Swift v. Tyson*, 42 U.S. (16 Pet.) 1 (1842). *Erie* held that *the judicial interpretation* given to section 34 of the 1789 Judiciary Act by *Swift* – not the statute itself – was unconstitutional because it allowed the federal courts to make law on subjects outside the legislative power of Congress.

Southland is not a garden variety error in statutory interpretation, where the Court can rely on Congress to clear up a disagreement over statutory intent.[9] Like *Swift*, *Southland* is a major federalism error that attributes to Congress an intention to intrude on state autonomy to a degree that pushes the FAA beyond the limits of

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[8] "Notwithstanding the rule [of statutory stare decisis], the Supreme Court has overruled or materially modified statutory precedents more than eighty times" between 1961 and 1988. William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 Geo. L. Rev. 1361, 1427-39 (1988).

[9] It seems problematic to rely on Congress to correct the Court's erroneous statutory interpretation, when the Court errs by attributing *too much* power to Congress. *But see Circuit City Stores v. Adams*, 532 U.S. at 122 (suggesting it is incumbent upon Congress, not the Court, to revisit *Southland*). Such a suggestion runs counter to this Court's reaffirmation of its role as watchman on the boundaries of Congressional power. *See Morrison*, 529 U.S. at 617 n.7. Moreover, even if Congress overrules *Southland*'s statutory interpretation, it cannot undo *Southland*'s implied constitutional interpretation that Congress has the power to regulate state court procedures.

Congressional power. Although *Southland's* FAA is narrower in scope than the general federal law considered in *Erie,* its effect on the states goes deeper: federal common law under *Swift* was not applicable in state court, and state statutes could in effect overrule federal common law decisions. *See Erie*, 304 U.S. at 71 (quoting *Swift*, 42 U.S. (16 Pet.) at 10) ("positive statutes of the state" are rules of decision under § 34). But *Southland* holds that the federal common law of the FAA binds state courts and nullifies state statutes. Thus, *Southland*'s reliance on the FAA – a fundamentally procedural law – as a basis to create a body of federal judge-made law that preempts state lawmaking is arguably even more constitutionally problematic than *Swift.*

B. *Southland*'s Authority Has Been Eroded by Subsequent Decisions of this Court

Southland's authority has been eroded by several subsequent decisions of this Court treating the FAA as procedural. *Rodriguez*, 490 U.S. at 482-83; *accord EEOC v. Waffle House*, 534 U.S. 279, 295 (2002) (arbitration agreement is "effectively a forum selection clause"); *Circuit City Stores v. Adams*, 532 U.S. 105, 123 (2001); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

It may also be quite true that no Justice who has sat on this Court since 1994 even believes *Southland* was correctly decided, whereas five Justices who sat on this Court after 1994 have, at one time or another specifically stated that *Southland* was wrongly decided. *See Southland*, 465 U.S. at 18-21 (Stevens, J., concurring in part

and dissenting in part) (dissenting from proposition that § 2 of the FAA preempts state statutes, as opposed to common-law rules, limiting enforceabilility of arbitration agreements for certain types of cases); 465 U.S. at 24 (O'Connor, J., joined by Rehnquist, J., dissenting) (*Southland* majority wrongly concluded that FAA § 2 created federal substantive rights that must be enforced in state courts); *Allied-Bruce*, (O'Connor, J., concurring) (same); *id.* at 284-85 (Scalia, J., dissenting) ("Adhering to *Southland* entails a permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes"); *id.* at 285 (Thomas, J., joined by Scalia, J., dissenting) ("In my view, the Federal Arbitration Act does not apply in state courts"). While this Court declined to overrule *Southland* ten years ago in *Allied-Bruce*, and while the plurality opinion in *Green Tree Fin. Serv. v. Bazzle*, 539 U.S. 444 (2003), took FAA preemption as a given, in neither case did the Court consider *Southland*'s constitutional infirmities.

C. *Southland*'s Unworkable Test for Preemption Has an Unsettling Effect on the Law That Outweighs Any Legitimate Reliance Interests by Private Contracting Parties

Southland has been construed by this Court as creating a rule that state laws that target arbitration agreements for special barriers to enforcement are preempted, whereas "generally applicable contract defenses" and rules that "arose to govern . . . contracts generally" may be applied to arbitration agreements "without contravening [FAA] § 2." *Doctors Associates v. Casarotto*, 517 U.S. 681, 687 (1996) (quoting *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987)). This distinction between "general contract law"

and "arbitration-specific" rules, which reflects internal contradictions in *Southland*, is incoherent and has defied consistent application in all but the clearest cases. See Schwartz, *Power of Congress, supra* at 554-70.

For instance, some courts have held that laws regulating non-arbitration matters in certain kinds of contracts – such as venue provisions in consumer contracts – are not "generally applicable" because they do not apply to all contracts, and are therefore preempted in arbitration cases. *See, e.g., Bradley v. Harris Research*, 275 F.3d 884 (9th Cir. 2001) (holding FAA preempts venue provision in state franchise law); *KKW Enterprises v. Gloria Jean's Gourmet Coffees Franchising Corp.*, 184 F.3d 42, 50 (1999) (same); *Doctors Associates v. Hamilton*, 150 F.3d 157, 163 (2d Cir. 1998) (same). These holdings threaten to undermine broad swaths of state contract regulation. An arbitration agreement could be written to mandate a waiver of injunctive relief, compensatory damages or attorneys' fees guaranteed by a state consumer or antidiscrimination statute: because those statutes are not "general contract law" they would be preempted and the arbitration agreement "enforced as written" under this spin on *Southland*'s "general law" analysis.

Few legitimate expectations are settled by *Southland*. On the contrary, it is clear that, in the past several years, corporate drafters of arbitration agreements have not been resting on settled expectations, but have been aggressively experimenting with arbitration agreements to find new ways to use them to limit their customers' or employees' remedies against them. *See, e.g., Ting v. AT&T*, 182 F. Supp. 2d 902, 924-28 (N.D. Cal. 2002), *aff'd in part, rev'd in part* 319 F.3d 1126 (9th Cir. 2003) (arbitration agreement purported to limit liability for wilful

misconduct, limit or bar compensatory and punitive damages, preclude class actions, and impose secrecy requirements); *Stirlen v. Supercuts*, 51 Cal. App. 4th 1519, 60 Cal. Rptr. 2d 138, 142-43 (1997) (arbitration agreement purported to require adhering party to waive tort damages and attorneys fees, while leaving drafting party free to pursue claims in court).

D. *Southland*'s Imposition of a "National Policy Favoring Arbitration" on the States Intrudes on the State-Federal Balance by Preempting Broad Swaths of State Contract Law

To the extent that cases about arbitration agreements are about something other than procedure, that something is contracts, an area of traditional state regulation which federal courts should be "reluctant to federalize." *Patterson v. McLean Credit Union*, 491 U.S. 164, 183 (1989) (quoting *Santa Fe Industries v. Green*, 430 U.S. 462, 479 (1977)). Since *Southland* was decided in 1984, scores of state laws have been held preempted or become subject to FAA preemption; just since 2002, at least fifty different state laws have been held preempted under *Southland*. David S. Schwartz, *State Judges as Guardians of Federalism: Resisting the Federal Arbitration Act's Encroachment on State Law*, 16 Wash. U. J. L. & Pol. 129, 234 (2004).

The values of federalism, articulated in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), provide a basis for evaluating *Southland*'s federalism error:

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be

> more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Gregory, 501 U.S. at 458; *accord United States v. Lopez*, 514 U.S. 549, 552 (1995) (citing *Gregory* as setting forth the "first principles" of federalism); *id.* at 581 (Kennedy, J., concurring) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (arguing that states can serve as "laboratories for experimentation" in social policy). Each of these values of federalism assumes a substantial degree of state lawmaking autonomy; none would have much meaning if the states were merely "regional offices [ ]or administrative agencies of the federal government." *New York v. United States*, 505 U.S. 144, 188 (1992).

Preemption doctrine represents the most significant and frequently applied limitation on substantive state autonomy in our constitutional scheme. *See* Stephen A. Gardbaum, *The Nature of Preemption*, 79 Corn. L. Rev. 767, 768 (1994). While federal commerce power still potentially reaches most subjects of legislation even after *Lopez* and *United States v. Morrison*, 529 U.S. 598 (2000), preemption doctrine holds that Congress may nullify state law on any subject within federal legislative jurisdiction. Therefore,

> the true test of federalist principle may lie, not in the occasional effort to trim Congress's commerce power at its edges . . . or to protect a state treasury from a private damage action . . . but rather

> in those many statutory cases where courts interpret the mass of technical detail that is the ordinary diet of the law

– namely, preemption cases. *Egelhoff v. Egelhoff*, 532 S. Ct. 141, 161 (2001) (Breyer, J., dissenting).

E. This Court's "Clear Statement" Rule and the Doctrine of Constitutional Avoidance Undermine Any Contention that *Southland* Properly Construes the FAA

Southland plainly violated two well-established principles of statutory construction that should operate to protect federalism and state autonomy in the application of the FAA. A well-established principle of judicial restraint, the doctrine of constitutional avoidance, holds that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159, 173 (2001) (internal quotations omitted) (narrowly construing the federal Clean Water Act to avoid federalism-based constitutional question). As shown above, *Southland*'s imposition of a fundamentally procedural federal law on the states raises serious constitutional objections that are sufficient to reject the *Southland* interpretation of the FAA as preemptive substantive law.

Likewise, this Court held in *Gregory* that "[i]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention unmistakably clear in the language of

the statute." 501 U.S. at 460 (internal quotations omitted). This "clear statement" rule has long been applied in preemption cases: "'where . . . the field which Congress is said to have preempted includes areas that have been traditionally occupied by the States,' congressional intent to supersede state laws must be 'clear and manifest.'" *Allied-Bruce*, 513 U.S. at 283 (O'Connor, J., concurring) (quoting *English v. General Electric Co.*, 496 U.S. 72, 78-79 (1990)). "To the extent that federal statutes are ambiguous, we do not read them to displace state law." *Allied-Bruce*, 513 U.S. at 292 (Thomas, J., dissenting); *accord Southland*, 465 U.S. at 18 (Stevens, J., concurring in part and dissenting in part) ("The exercise of state authority in a field traditionally occupied by state law will not be deemed pre-empted by a federal statute unless that was the clear and manifest purpose of Congress").

Does the FAA include a "clear statement" of Congressional intent to preempt state law, as would be required under *Gregory*? No. It is widely recognized that the "national policy favoring arbitration" was not the creation of the FAA as written by Congress, but was instead a judicial creation – federal common law – that took the FAA as a point of departure. *See Allied-Bruce*, 513 U.S. at 283 (O'Connor, J., concurring) ("the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation"). As has been clearly demonstrated in two scholarly dissenting opinions from this Court, the *Southland* opinion flouted the FAA's historical record, which showed that Congress intended the FAA to be a procedural statute that neither applied in state court nor preempted state law. *See Allied-Bruce*, 513 U.S. at 285-95 (Thomas, J., dissenting); *Southland*, 465

U.S. at 23-31 (O'Connor, J., dissenting).[10] But even the *Southland* majority opinion conceded the absence of anything that would meet the "clear statement" test, when it went outside the FAA's text to rely on a legislative history that was "not without ambiguities." 465 U.S. at 12.

There is no question that were *Southland* being decided for the first time today, this Court would apply *Solid Waste Agency* and *Gregory* to reject the argument that the FAA is substantive law binding on the states.

CONCLUSION

Southland's rule of Federal Arbitration Act preemption "entails a permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes." *Allied Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 284-85 (1995) (Scalia, J., dissenting). It is time that *Southland* be overruled. Amici respectfully submit that, on this basis, this Court affirm the decision below.

Dated: September 23, 2005

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[10] For additional historical evidence supporting the arguments in the O'Connor and Thomas dissents, *see* David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: the Supreme Court and the Federal Arbitration Act*, 67 Law & Contemp. Prob. 5 (2004).